

UTAH ALCOHOLIC BEVERAGE CONTROL COMMISSION
SUMMARY OF S.B. 211
(effective May 5, 2008 unless otherwise indicated)

1. Flavored Malt Beverages & Alcohol Energy Drinks.

Background. Off-premise beer retailers such as grocery and convenience stores currently sell flavored malt beverages (FMBs). These are beer products that are not traditionally produced. Instead, a fermented base of beer is brewed at the brewery. The malt beverage character such as color, bitterness, and taste, and some of the fermented alcohol is then removed from the base. Various flavors that typically contain distilled spirits are then added to achieve a desired taste profile and alcohol level. While the overall alcohol content of the finished product is similar to that of traditional beer, as much as 49% of that alcohol is derived from the distilled spirit component of the added flavors, not from fermentation. These products exhibit little or no traditional beer character; their flavor is derived primarily from the added flavors rather than from malt and other materials used in fermentation. The federal government requires brewers of these products to file the formula of each FMB with the U.S. Alcohol Trade and Tax Bureau (27 C.F.R. §25.55).

FMBs are sold under many proprietary names and include alcoholic fruit drinks, colas, energy drinks, cooler-type products, and other flavored alcohol beverages. Some brewers have partnered with distilled spirits producers to label FMBs with prominent distilled spirits brand names. These have become popular among underage drinkers as “starter” drinks. How FMBs are classified may affect:

- the rate of tax applicable to these products;
- the premises from which they may be sold;
- the way they are labeled, advertised and marketed; and
- the degree of exposure of these products to underage drinkers.

With respect to the way FMBs have been labeled, recent surveys have shown that many consumers are not aware that these products contain alcohol. The beverages often come in bottles and cans that resemble non-alcoholic soft drinks, flavored waters, teas, and juices. Some alcohol energy drinks have labels that are difficult to distinguish from non-alcoholic energy drinks in terms of size, shape, and graphics. This has created some confusion among underage youth, parents, teachers, law enforcement, retail employers and employees, and other members of the general public regarding which products contain alcohol and which do not.

Utah’s New FMB Law. S.B. 211 regulates FMBs in two ways:

- (a) **Reclassification.** The definition of “alcoholic beverages” will now include three categories: beer, liquor, and FMBs. FMBs will be classified as “liquor” and not “beer” products. The definition of FMBs is as defined in federal law (27 C.F.R. Sec. 25.55).¹

¹The Utah definition reads:

“Flavored malt beverage” means a beverage: (a) that contains at least .5% alcohol by volume; (b) that is treated by processing, filtration, or another method of manufacture that is not generally recognized as a traditional process in the production of a beer as described in 27 C.F.R. Sec. 25.55; (c) to which is added a flavor or other ingredient containing alcohol, except for a hop extract; and (d) for which the producer is required to file a formula for approval with the

This means that these products may only be sold in Utah's state liquor stores and package agencies, and in on-premise retail establishments that have a full-service liquor license. They will no longer be sold in grocery and convenience stores, or in establishments that only hold beer, or beer/wine licenses.

Reclassification will take effect on October 1, 2008 (to allow current stock to be depleted). Beginning August 1, 2008, a manufacturer of these products must file a report with the Utah DABC listing each product they seek to market in Utah.

Beginning October 1, 2008, the DABC will post on a quarterly basis, those FMB products that are classified as "liquor" products, and those few products that may be sold as "beer" products because they received a federal exemption from the FMB classification under 27 C.F.R. Sec. 25.55(f).²

(b) **Labeling.** Beginning October 1, 2008, all beer products must receive *basic* label approval from the DABC. This will require that they:

- comply with all federal label requirements; and
- clearly put the public on notice that the beverage is an alcoholic beverage (which can be satisfied by using terms such as beer, ale, porter, stout, lager, lager beer, or any other class or type designation commonly applied to malt beverages that conveys by a recognized term that the product contains alcohol)

However, additional labeling will be required on FMBs that are labeled and packaged in a manner similar to nonalcoholic beverages. The labels and outer packaging visible to a consumer (i.e. carton, case, or other wrapper of a container) must have prominently displayed either on the label or a firmly affixed sticker the words "alcoholic beverage" or "contains alcohol". The label and packaging must also include a statement of alcohol content by either weight or volume which may not be abbreviated. These terms must be in a format required by ABC commission rule. Labels and packaging may be rejected if it appears that they are designed to obscure the required information.

In deciding whether an FMB is labeled and packaged in a manner similar to nonalcoholic beverages, the DABC may consider in addition to other factors the following:

- whether the coloring, carbonation, and packaging is similar to or can be confused with nonalcoholic beverages;
- whether the FMB possesses a character and flavor distinctive from a traditional malted beverage;
- whether the FMB is prepackaged, contains high levels of caffeine and other additives, and is marketed as an energy drink;
- whether the FMB contains added sweetener or sugar substitutes; and
- whether the FMB contains an added fruit flavor or other flavor that masks the taste of a traditional malt beverage.

United States Alcohol and Tobacco Trade and Tax Bureau pursuant to 27 C.F.R. Sec. 25.55, or that is not exempt under Subdivision (f) of 27 C.F.R. Sec. 25.55.

²Federal exemptions under 27 C.F.R. Sec. 25.55(f) are granted only if it can be shown that the coloring, flavoring, or food material that is added is generally recognized as a traditional ingredient in the production of beer, ale, porter, stout, lager, etc.

Beer Displays. The bill also regulates the display of beer products in grocery and convenience stores. Stores that sell beer (not FMBs) for off-premise consumption must display the beer in an *“area that is visibly separate and distinct”* from where nonalcoholic beverages are displayed. (Non-alcoholic beers may be displayed with the alcoholic beers.) The stores must also post a sign in the alcoholic beverage display area that reads: *“These beverages contain alcohol. Please read the label carefully.”*

2. **Size of spirituous drinks modified.** The primary spirituous liquor in a drink is increased from one ounce to up to 1.5 ounces. The maximum amount of spirituous liquor in a mixed drink is reduced from 2.75 ounces to 2.5 ounces. Patrons of private clubs and airport lounges may have two spirituous liquor drinks at a time provided that the second drink is not a “sidecar” (the same spiritous liquor as the primary liquor in the first drink). Patrons of restaurants may have only one spirituous drink at a time.
3. **Quota adjustments.** Limited restaurant licenses that allow the sale of beer & wine only, not distilled spirits, have been at or near the current statutory quota since March, 2007. They are the most popular type of license. S.B. 211 changes the quota for limited restaurants from 1/11,000 to 1/9300. This will provide approximately 45 additional licenses to issue. Conversely, there has been a consistent surplus of available private club and tavern licenses. S.B. 211 reduces the club quota from 1/7300 to 1/7850, and reduces the tavern quota from 1/25,000 to 1/30,500. This will leave approximately 17 club licenses and 25 tavern licenses available to issue. In summary, the overall quota adjustments will not result in an increase in the overall number of licenses in the state.
4. **Proximity restriction variances.** The bill modifies the commission's current power to grant proximity variances with respect to locating state stores, package agencies, and all types of retail licenses (full-service and limited restaurants, clubs, taverns, on-premise beer, and banquet licenses) within proximity to churches, schools, parks, playgrounds and libraries. It allows the commission to consider a variance to the 600' pedestrian travel measurement restriction in any city (regardless of size), but it does not allow the commission to grant a variance to the 200' straight line measurement restriction with respect to churches, schools, and playgrounds. It does allow variances to the 200' measurement with respect to parks and libraries.

Variances that are allowed may be granted only if: (1) the local (governmental) authority gives its written consent to the variance; (2) a public hearing has been held; (3) the commission determines that granting the variance it will not be detrimental to the public health, peace, safety, and welfare of the community; and either (4)(a) the governing authority of the church, school, park, playground, or library gives its written consent to the variance; or (4)(b) if written consent is not given, the commission must find that: (i) there is substantial unmet public demand to consume alcohol in a public setting within the geographic boundary of the local (governmental) authority in which the business seeking the alcohol license is to be located; (ii) there is no reasonably viable alternative for satisfying the unmet public demand other than through the establishment of the license at the location; and (iii) there is no reasonably viable alternative location within the geographic boundary of the local (governmental) authority in which the licensed business is to be located to satisfy the unmet demand.
5. **Knowingly allowing illegal drug use on a licensed premises.** The DABC receives referrals from law enforcement agencies seeking administrative action against licensees for alcohol violations. Some of these reports refer to the open use of illicit drugs and drug paraphernalia by owners, employees, and patrons of the business. Yet, current law does not make it a *regulatory* violation for a DABC licensee or employee of a licensee to knowingly allow such illegal activities on the licensed premises. S.B. 211 will allow the commission to suspend or revoke the license and/or impose an administrative fine for allowing such illicit drug activity.
6. **Criminal History Background Checks.** S.B. 211 allows the DABC to obtain criminal history

background information from the Utah Bureau of Criminal Identification (BCI) and the FBI on those individuals currently identified in the ABC Act that are prohibited from being convicted of certain offenses. Currently, the DABC is requiring these individuals to obtain their own criminal background checks from these agencies. Under this approach, the individuals are experiencing delays of over six months with respect to the FBI. By allowing the DABC to obtain the information, the delay will be reduced to approximately four weeks. Moreover, this approach will better ensure the accuracy of the information.

7. **Private Club Price Lists.** Private clubs (and restaurants) are required by statute to inform patrons of any charges assessed in connection with the sale, service, or consumption of liquor. These include charges for the supply of glasses, set-ups, chilling fees, wine services, etc. and may be stated in food or alcoholic beverage menus.³ However, current law also requires clubs to include these charges in their house rules.⁴ Another more general statute relating to house rules provides that any changes in a club's house rules are not effective unless submitted to the DABC within ten days after adoption, and become effective 15 days later unless rejected by the department.⁵

This bill eliminates the requirement that service charges be fixed in a club's house rules. It amends 32A-5-107(35) to read: *"A private club shall have readily available for its patrons a printed alcoholic beverage price list or menu containing current prices of all alcoholic beverages including any set up charges, service charges, and chilling fees."*

8. **Unlicensed Businesses.** 32A-12-301 currently requires restaurants, airport lounges, private clubs, on-premise beer retailer outlets, on-premise banquet premises, or similar establishments and organizers of events to obtain a license or permit before allowing persons to purchase or consume alcoholic beverages on their premises. S.B. 211 also makes it a criminal offense for an alcohol manufacturer, local industry representative, liquor warehouse, beer wholesaler, and public service permittee to operate without first obtaining an alcohol license.

³Utah Code Ann. §§32A-4-106(18) (restaurants) and 32A-5-107(35)(b)(clubs).

⁴§32A-5-107(35)(a).

⁵§32A-5-107(11).